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NO. 87-5546

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did jury instructions given pursuant to article 37.071(b) of the Texas Code of Criminal Procedure deprive the jury of any procedure for considering and expressing the conclusion that the mitigating evidence called for a sentence less than death?

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CITATION TO OPINIONS BELOW

The opinion of the court of appeals is reported at 823 F.2d 98 (5th Cir. 1987), and is set out at pages 32-34 of the Joint Appendix (JA). The order and memorandum of decision by the United States District Court, Western District of Texas, are unreported. JA 21-30.

JURISDICTION

The opinion of the court of appeals was delivered on July 30, 1987. The petition for writ of certiorari was filed on September 25, 1987, and certiorari was granted on October 9, 1987. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States. It also involves section 19.03 of the Texas Penal Code and article 37.071 of the Texas Code of Criminal Procedure. The text of these provisions is set out in Appendix A.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Donald Gene Franklin was charged by bill of indictment which alleged that he committed the offense of capital murder by intentionally causing the death of Mary Margaret Moran in the course of robbery, kidnapping and aggravated rape, in violation of § 19.03(a)(2) of the Texas Penal Code. JA 5-6. Trial was before a jury which convicted Mr. Franklin of capital murder. At

the punishment hearing, the jury answered affirmatively both special issues submitted under article 37.071(b) of the Texas Code of Criminal Procedure. Accordingly Mr. Franklin was sentenced to death. JA 18-20. The conviction and sentence were affirmed on direct appeal. Franklin v. State, 693 S.W.2d 420 (Tex. Crim. App. 1985). Certiorari was denied. Franklin v. Texas, 106 S. Ct. 1238 (1986). The particular question presented in this brief was not raised on direct appeal.

Mr. Franklin then filed an application for writ of habeas corpus in the state trial court pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon 1977). The question presented in this brief was raised in the habeas application in two related grounds. First, Mr. Franklin contended that the trial court had erred in refusing his special requested instructions on mitigating evidence. Second, he contended that appellate counsel was ineffective for not raising this issue on direct appeal. The trial court recommended that relief be denied, and, on April 8. 1986, the Texas Court of Criminal Appeals denied relief on the application for writ of habeas corpus.

Mr. Franklin next raised this question in a petition for writ of habeas corpus filed in the United States District Court for the Western District of Texas, pursuant to 28 U.S.C. § 2254. Following an evidentiary hearing, the United States Magistrate recommended that the petition be denied. Mr. Franklin objected to the findings, conclusions and recommendation of the magistrate. After conducting a de novo review, the district

court adopted the magistrate's recommendation and denied the petition for writ of habeas corpus. JA 21-29.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed. Franklin v. Lynaugh, 823 F.2d 98 (5th Cir. 1987). JA 32-34. No motion for rehearing was filed.

B. Material Facts

Mary Margaret Moran was a staff nurse employed by the Audie Murphy Veteran's Hospital in San Antonio, Texas on July 25, 1975. [R.VIII--2046-2047][1] She was last seen on that night approximately 11:50 p.m., just before the end of her shift. [R.VIII--207J] Five days after her disappearance, on July 30, 1975, Ms. Moran was found alive in a field a short distance from the hospital. [R.X--2514, 2521] When found she was "very lucid and clear" and able to talk. [R.X--2641] At her request she was taken to the Methodist Hospital, where she died at approximately 6:30 a.m. on July 31, 1975. [R.X--2620, 2628, 2641] According to the state's medical witness, the cause of death was "shock, multiple stab wounds to the body, dehydration, and blood in the left chest cavity." [R.X--2628]

The evidence against Mr. Franklin was wholly circumstantial, consisting primarily of evidence which linked him to the car in which Ms. Moran was apparently abducted. Two eyewitnesses identified Mr. Franklin as the driver of the car. One saw him

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1. In this brief, "T.," followed by a volume and page number, refers to the transcript in the state trial court, which contains the documents, pleadings, motions and orders. "R," followed by a volume and page number refers to the statement of facts in the state trial court.

shortly after midnight in the hospital parking lot. He testified that he got a good look at the man, although he was depending on artificial illumination at a distance of 30 to 35 feet. [R.VIII--2120-2121] The second witness also saw him driving the car from the hospital parking lot. This witness, a security guard at the hospital, attempted unsuccessfully to stop the car. [R.VIII--2201-2203] At trial, Mr. Franklin's attorney asked this witness whether he had mistakenly identified another person as the driver of the vehicle in a previous trial. [R.VIII--2239-2241] Although the witness acknowledged making a mistake, he also appeared to blame the court reporter for misunderstanding his testimony. [R.VIII--2241-42]

The car that left the hospital lot that night was traced to Mr. Franklin. [R.IX--2006, 2213, 2261, 2293] At approximately 2:00 a.m., the police arrived at Mr. Franklin's house, found the car parked in front of his house, and observed blood in it. [R.IX--2262-64] Mr. Franklin was then arrested, and his car and house were searched. Blood, hair, and soil in the car revealed that it was probably the vehicle in which Ms. Moran was abducted and taken to the field. [R.X--2597-98, 2626, 2662, 2682-83] Clothing found inside Mr. Franklin's house had blood on it and appeared to be connected to the abduction of Ms. Moran. [R.X--2591-94, 2700, 2678-86] In a trash can outside his house, several items of Ms. Moran's personal property were found, [R.IX--2407], as well as a knife. [R.X--2687]

Mr. Franklin made no inculpatory statement. Further, there

was no unequivocal physical evidence linking Mr. Franklin personally and directly to the commission of this crime. His fingerprints were not found on any of Ms. Moran's personal items that were found in the trash can outside his house. Similarly, even though Ms. Moran was apparently assaulted initially when she was in her car at the hospital parking lot, [R.VIII--2208-12], Mr. Franklin's fingerprints were not found on or inside her car. [R.VIII--2112-13]

In the defense case during the guilt-innocence phase of the trial Mr. Franklin did not testify. He called two witnesses who testified about the medical treatment Ms. Moran received at the Methodist Hospital. [R.XI--2754, 2763] One of these witnesses, Harvey Cox, testified that he was the paramedic who attended Ms. Moran. [R.XI--2756] He had wanted to take Ms. Moran to the Bexar County Hospital because it was better staffed and equipped to handle an emergency. [R.XI--2757] He was overruled, however, by a doctor on the scene. [R.XI--2757][2]

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2. Mr. Franklin sought to prove as well that the crime had been committed by an acquaintance of his, Eugene "Smokey" Tealer. Evidence was offered to the trial court, outside the jury's presence, showing that Tealer had been employed at a nearby medical complex in July, 1975, [R.XI--2780], and that he had worked on July 25, 1975 from 3 p.m. until 11.30 p.m. [R.XI--2786] Tealer had been convicted of abducting, raping at knife point, and brutally beating, a Veteran's Administration Hospital nurse, prior to trial but after the killing of Ms. Moran, on February 18, 1976. [R.XI--2795-2801] Mr. Franklin also attempted to prove that Tealer bore a physical resemblance to him, [R.XI--2791], and that Franklin had loaned his vehicle to Tealer twice prior to July 25, 1975. [R.XI--2828]

The state objected to this proffered evidence, and with a limited exception, the objection was sustained "until such time as you have evidence which directly relates Eugene Tealer III to

Prior to commencement of the trial, the state abandoned the portion of the indictment alleging murder in the course of aggravated rape, electing to proceed instead on the theory that the murder was committed in the course of robbery and kidnapping. [R.III--688] The jury was instructed accordingly, and, it was also instructed on the lesser included offense of murder. [T.I--28-32] The court also charged the jury that this was "a case depending for conviction on circumstantial evidence." [T.I--33]

The state recognized in its summation that this was a circumstantial evidence case, [R.XII--2870], but further argued that it was well investigated and solid and that the evidence clearly showed Mr. Franklin guilty beyond a reasonable doubt. [R.XII--2902]

Mr. Franklin's attorneys, on the other hand, contended that there were two central issues in the case. [R.XII--2884] First, counsel argued that Mr. Franklin was mistakenly identified by the two eyewitnesses. [R.XII--2886, 2900] Second, and alternatively, counsel submitted that, assuming Mr. Franklin killed Ms. Moran, he lacked the specific intent to do so, and was guilty only of murder, not capital murder. [See T.I--32] In support of this latter theory, counsel reminded the jury of testimony and medical records indicating that Ms. Moran was

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this offense." [R.XI--2753] While the court would have admitted the testimony that the car had been loaned to Tealer twice previously, [R.XI--2853], defense counsel declined to offer this testimony, contending that it was "meaningless unless the jury is permitted to know who Eugene Tealer is and what his subsequent offenses have been and he was known to the police department on July 26, 1975." [R.XI--2854]

"seriously mismanaged in the hospital." [R.XII--2895-2899] The jury deliberated for almost five hours before finding Mr. Franklin guilty of capital murder. [T.I--13A]

At the punishment phase of the trial, the state called four police officers who testified Mr. Franklin had a bad reputation as a peaceful and law-abiding citizen. [R.XIII--2925-2934] Phylis Green testified that Mr. Franklin had raped her in 1974. [R.XIII--2935] And finally, the state proved a prior conviction for rape. [R.XIII--2946] The parties stipulated that Mr. Franklin had no record regarding disciplinary violations while incarcerated at the Texas Department of Corrections from 1971 until 1974 and from 1976 until 1980. [R.XIII--2952-2953]

Mr. Franklin submitted five special requested instructions seeking to inform the jury that it must consider relevant mitigating circumstances when determining the appropriate sentence. [T.I--47-51]; JA 7-12. Although timely submitted, the requests were not included in the charge. [R.XIII--2953] This procedure employed by Mr. Franklin preserved error under Texas law. See Tex. Code Crim. Proc. Ann. art. 36.15 (Vernon 1981). The one page charge on punishment actually submitted, and the accompanying special issues, did not mention the word "mitigation." [T.I--53-54]. Only special issues numbers one and two were submitted to the jury. Tex. Code Crim. Proc. Ann. art 37.071(b)(1) & (2)(Vernon 1981). After approximately five hours of deliberation, the jury answered both questions "yes," and the court sentenced Mr. Franklin to death. [T.I--13B-13C].

SUMMARY OF THE ARGUMENT

The sentencing jury was asked two statutory questions to determine whether Donald Franklin would live or die. These questions were concerned solely with whether the murder was committed deliberately and with the probability that Mr. Franklin would be dangerous in the future. Given the narrowness of the questions, the evidence before the jury pointed strongly to affirmative answers to both. In addition to the evidence which supported the affirmative answers and, therefore, a death sentence under Texas law, there was also evidence that weighed in favor of a sentence less than death. Because of the restrictive nature of the statutory questions, however, there was no procedure through which the jury could give effect to its view of the mitigating evidence. In an effort to remedy this problem, Mr. Franklin's attorneys requested jury instructions which would have explicated and broadened the facially narrow special issues to include consideration of the mitigating evidence offered in this case. These instructions were not given, and, as a result, the jury was precluded from considering relevant mitigating evidence, permitted to exclude that evidence from consideration, and prevented from giving independent weight to that evidence. This was inconsistent with the Eighth Amendment.

The constitutional defects in Mr. Franklin's sentencing proceeding did not arise because of unique misapplication of the Texas death penalty statute in his case. They occurred because the Texas statute lends itself to constitutionally defective

application respecting the jury's consideration of mitigating evidence. Although in Jurek v. Texas, 428 U.S. 262 (1976), the court was led to believe "that in considering whether to impose a death sentence the [Texas] jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it," Id. at 273, that promise has proven to be hollow. The Texas courts have consistently refused to require instructions that would assure the jury's consideration of mitigating evidence and that would provide a mechanism for the jury to impose a life sentence on the basis of mitigating evidence. Standing alone among the states in its refusal to assure that its capital sentencing scheme satisfies the mandate of Lockett v. Ohio, 438 U.S. 586 (1978), Texas abets the very Lockett error that occurred in Mr. Franklin's trial.

ARGUMENT

I.

MR. FRANKLIN'S SENTENCING VIOLATED LOCKETT V. OHIO BECAUSE, UNDER THE INSTRUCTIONS GIVEN, THE JURORS WERE DEPRIVED OF ANY PROCEDURE FOR CONSIDERING AND EXPRESSING THE CONCLUSION THAT THE MITIGATING EVIDENCE CALLED FOR A SENTENCE LESS THAN DEATH

A. Introduction

At the conclusion of Mr. Franklin's sentencing trial, the jury was instructed, in accord with the Texas capital sentencing statute, that his sentence would be based upon its answers to two questions. These questions, concerned with whether the homicide had been committed deliberately and with whether Mr. Franklin would likely be dangerous in the future, were to be answered "yes" or "no." [T.I--54]; JA 13-16.[3] The jury was given no direction concerning the evidence it was to consider in answering these questions. It was told only to answer the questions and was not given any other way to speak to Mr. Franklin's sentence. The jury was informed that if it answered both questions

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3. The questions were the following:

> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Donald Gene Franklin, that caused the death of Mary Margaret Moran, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society?

[T.I--54]; JA 13-16.

affirmatively, the court was required to sentence Mr. Franklin to death, but that if it answered only one of the questions affirmatively, the court was required to sentence him to life imprisonment. Id.

The evidence before the jury dramatically invited affirmative answers to the two "special issue" questions that were presented. The jury had already convicted Mr. Franklin of intentionally causing the death of Ms. Moran in the course of robbery and kidnapping. [T. I--38]; JA 19. That verdict logically entailed a "yes" answer to the question whether the homicide was "committed deliberately and with the reasonable expectation that the death of the deceased . . . would result." In the sentencing trial, the state presented evidence to show that Mr. Franklin had previously been convicted of rape, that he had committed another rape (prior to the murder of Ms. Moran) upon his release from prison, and that he had a reputation for violence in the community. This evidence clearly supported, if not compelled, the finding of "a probability" that Mr. Franklin "would commit criminal acts of violence that would constitute a continuing threat to society."

The jury also had before it evidence that weighed in favor of a sentence less than death. The state's evidence of guilt was wholly circumstantial, "which however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction, might convince a jury and a court that the ultimate penalty should not be exacted,

lest a mistake may have been made." King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). See Lockhart v. McCree, 106 S.Ct. 1758, 1769 (1986)(recognizing that "the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase"). In addition, the state stipulated to evidence that Mr. Franklin had a good prison record. As this Court has explained, "[i]t can hardly be disputed" that evidence that the defendant "ha[s] been a well behaved and well-adjusted prisoner" is "relevant evidence in mitigation of punishment." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). Unquestionably, "the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison." Id.

The problem which faced the jury in its deliberations upon Mr. Franklin's case under the instructions given was that even if the jurors concluded that the mitigating evidence called for a sentence less than death, they had no procedural mechanism through which to express that conclusion. The jury was not informed that the mitigating evidence might be considered as bearing upon the two special issues, to which it was not self-evidently relevant, nor that it might bear independently upon the choice of sentence. The jury was told only to answer the two questions yes or no. Neither through these verdicts nor outside of them could the jury voice its view of the effect, if any, that

it thought the mitigating evidence should have. As the Fifth Circuit has recently described this problem in another case,

> The jury was allowed to hear all evidence that might mitigate the culpability of [the petitioner's] deeds or his person. The jury could then consider (i.e. think about) the bearing of all of the evidence, aggravating and mitigating, upon the ultimate question of whether [petitioner] should be put to death. If, however, that consideration should lead the jury to decide against the death sentence, how is the decision given effect and incorporated into the verdict? No interrogatory asks about that most crucial decision. Having said that it was a deliberate murder and that [petitioner] will be a continuing threat, the jury can say no more.

Penry v. Lynaugh, ___F.2d___, No. 87-2466 (5th Cir. November 25, 1987), slip op. 674-75.

Recognizing this problem, in Mr. Franklin's case his lawyers tendered various instructions which sought to provide a procedural mechanism through which the jury could give effect to its view of the mitigating evidence. For, although the Texas Court of Criminal Appeals in Jurek said,[4] and this Court in Jurek therefore assumed,[5] that the Texas statute allowed room for consideration of any feature of the defendant or the crime which was put forward by the defense as mitigating, the unexplicated special issues provided no way in which that could be done in connection with Mr. Franklin's particular mitigating evidence. Counsel therefore drafted an array of instructions that sought to

4. Jurek v. State, 522 S.W.2d 934 (Tex. Crim. App. 1975).

5. Jurek v. Texas, 428 U.S. 262 (1976).

fit Mr. Franklin's mitigating evidence into every possible chink in the Texas statutory framework.

Thus, proposed instructions One and Two would have told the jury that it could consider the mitigating evidence as bearing upon the ultimate questions of fact framed by the special issues:

> You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the Defendant's character or record, and any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is 'Yes'; and in the event such evidence does so cause you to have such a reasonable doubt, you should answer the Issue 'No.'

[T.I --47]; JA 7. (Defendant's Special Requested Charge on Punishment No. One).

> An answer of 'No' may be given to any of the issues . . . if evidence of any such mitigating factors causes at least ten (10) jurors to have a reasonable doubt as to whether the true answer to the issues is 'Yes.'

[T.I--48]; JA 8. (Defendant's Special Requested Charge on Punishment No. Two)(in pertinent part).

Proposed instructions Two, Three, Four, and Five offered alternative ways in which the jury could express the view that Mr. Franklin's mitigating evidence independently called for a life sentence despite its lack of bearing upon the ultimate questions of fact framed by the special issues:

> An answer of 'No' may be given to any of the issues . . . if at least ten (10) jurors find that mitigating factors against the

> imposition of the Death Penalty exist, either in regard to any aspect of the Defendant's character or record, or in regard to any of the circumstances of the commission of the offense which have been admitted in evidence before you . . . .

[T.I--48]; JA 8. (Defendant's Special Requested Charge on Punishment No. Two)(in pertinent part).

> You are instructed that you may answer any of the Special Issues 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty.

[T. I--49]; JA 10. (Defendant's Special Requested Charge on Punishment No. Three).

> You are instructed that you may answer Special Issue No. One 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty.

[T.I--50]; JA 11. (Defendant's Special Requested Charge on Punishment No. Four).

> You are instructed that you may answer Special Issue No. Two 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty.

[T.I--51]; JA 12. (Defendant's Special Requested Charge on Punishment No. Five).

Counsel for Mr. Franklin thus attempted in every conceivable way to have the commands of Lockett v. Ohio honored within the Texas statutory framework, but he was rebuffed at every turn. As we will show, that was constitutional error.

B. The Lockett Error in Mr. Franklin's Case: His Jury Was Precluded From Considering Relevant Mitigating Evidence, Permitted To Exclude That Evidence From Consideration, And Prevented From Giving Independent Mitigating Weight To That Evidence

The rules derived from Lockett v. Ohio, 438 U.S 586 (1978), "are now well established . . . ." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). See also Hitchcock v. Dugger, 107 S.Ct. 1821, 1822 (1987). These rules require that the sentencer:

(a) "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," Lockett v. Ohio, 438 U.S. at 604 (emphasis in original):

(b) not be permitted to "exclud[e] such evidence from [his or her] consideration," Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)(emphasis supplied); and

(c) not be "prevent[ed] . . . from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation," Lockett v. Ohio, 438 U.S. at 605.

All of these rules were violated in Mr. Franklin's sentencing proceeding.

1. Residual Doubt About Mr. Franklin's Guilt

Viewed in its totality, the evidence presented in the guilt-innocence phase of Mr. Franklin's trial left some room for doubt about his guilt. As argued by the defense, this doubt fell into three categories. First, the defense argued that Mr. Franklin

was mistakenly accused of this crime, because he had been misidentified as the person driving his car at the time the victim was apparently being abducted in the car. [R.XII--2885-2890][6] The defense pointed out the lack of scientific evidence tying Mr. Franklin directly to the offense and urged that it was reasonable to believe that another person could have borrowed Mr. Franklin's car that night and been misidentified as Mr. Franklin. [R.XII--2891-2892] Second, the defense argued that the killing was not committed with the specific intent to kill necessary for the offense of capital murder in Texas. [R.XII--2893-2896][7] Third, the defense argued that Ms. Moran "may have been saved" had she been taken to an appropriate hospital after she was discovered. [R.XII--2899-2900]

The fact that Mr. Franklin's jury determined, notwithstanding defense counsel's argument, that he was guilty beyond a reasonable doubt "does not necessarily mean that no juror entertained any doubt whatsoever." Smith v. Balkcom, 660

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6. Two witnesses identified Mr. Franklin as the driver, but the defense argued that their identifications were suspect--one witness because he was thirty or more feet away, at night, and could give only a general description of the driver; the other, because he was motivated to maintain his identification of the driver as Mr. Franklin in order to justify his status as a "hero," even though in a previous trial he had identified Mr. Franklin's lawyer as the driver. See R.XII--2887-2888.

7. Mr. Franklin was charged with the form of capital murder that requires that the defendant "intentionally commit[] the murder" in the course of committing or attempting to commit one or more of five enumerated felonies. See Section 19.03(a)(2) of the Texas Penal Code (Vernon 1974).

F.2d 573, 580 (5th Cir. 1981), cert. denied, 459 U.S. 882 (1982)(emphasis in original). As the Fifth Circuit explained,

> There may be no reasonable doubt--doubt based upon reason--and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt--this absence of absolute certainty--can be real.

Id (emphasis in original). In the circumstances of Mr. Franklin's case, the doubt about guilt urged by the defense arguably created an "absence of absolute certainty."

This residuum of doubt could reasonably have persuaded some jurors that the death penalty was not the proper punishment in Mr. Franklin's case. They could have believed "that the ultimate penalty should not be exacted, lest a mistake . . . [be] made." King v. Strickland, 748 F.2d at 1464. If any jurors did harbor such a feeling, they reasonably could have believed as well that the court's sentencing instructions precluded their consideration of it.

The jury was expressly directed to answer only the two questions presented to it at the sentencing stage. It was provided no other way in which to express its view of whether death was the appropriate punishment for Mr. Franklin in light of all the evidence and inferences from the evidence.[8] Nor was the

8. In Cordova v. State, 733 S.W.2d 175, 190 n.3 (Tex. Crim. App. 1987), the trial court instructed the jury that it could consider "all of the evidence" in answering the special issues. The appellate court held that "this instruction sufficiently instructed the jury, albeit indirectly, that it could consider any mitigating evidence in determining the answers to the special issues". Even this "indirect[]" instruction was not contained in Mr. Franklin's sentencing instructions.

jury told--as defense counsel's proffered instructions would have--that upon the finding of any factor that called for a sentence less than death, it could properly answer either of the special issue questions "no." Without the proffered instruction, therefore, "a reasonable juror could have interpreted the instruction," Sandstrom v. Montana 442 U.S. 510, 514 (1979), to forbid the consideration of any factor which was not evidently relevant to one of the two statutory questions. Residual doubt about Mr. Franklin's guilt, as we demonstrate below, was not self-evidently relevant to either statutory question. Thus, the failure to instruct upon its relevance or to provide some other procedural mechanism through which the jury could consider residual doubts about guilt in its sentencing deliberations precluded consideration of that factor in the determination of Mr. Franklin's sentence.

The trial court's failure to instruct also permitted the jury to exclude from its consideration any residual doubt about Mr. Franklin's guilt. As a practical matter, there was no logical connection between the two special issue questions and doubt about Mr. Franklin's guilt. Accordingly, without an instruction like that proffered by Mr. Franklin's counsel, which explained that there could properly be a connection between any mitigating factor and the statutory questions,[9] there can be no

9. See e.g., Defendant's Special Requested Charge on Punishment No. One ("[y]ou are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty . . . may be sufficient to cause you to have a reasonable doubt as to whether . . . the true answer to any of

assurance that the jury considered, rather than excluded, any doubt about guilt from its sentencing deliberations.

Residual doubt about Mr. Franklin's guilt was not self-evidently relevant to either of the special issue questions. The first question asked whether the jury found "beyond a reasonable doubt" that the homicide "was committed deliberately and with the reasonable expectation that the death of the deceased . . . would result." [T.I--54]; JA 15. In convicting Mr. Franklin, the jury had already found beyond a reasonable doubt that he had "intentionally committ[ed] the murder" of Ms. Moran. In light of this finding, the jury could logically have concluded that it had already determined "beyond a reasonable doubt," as well, that the homicide "was committed deliberately and with the reasonable expectation that the death of the deceased . . . would result." Not surprisingly, this is exactly what the prosecution argued. [R.XIII--2976] Unless told that residual doubt about Mr. Franklin's specific intent could be considered in relation to this question, the jurors could logically have concluded that such doubt was irrelevant to the question. Any residual doubts they may have had about whether Mr. Franklin was involved at all in killing Ms. Moran, or whether his acts actually caused her death, were even less likely to be considered as relevant to this question.

Similarly, residual doubt about Mr. Franklin's guilt was not self-evidently relevant to the second special issue question. To

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the Special Issues is 'yes' . . . .")

prove "a probability that [Mr. Franklin] would commit criminal acts of violence that would constitute a continuing threat to society," [T.I--54]; JA 15 (Special Issue Number Two), the prosecution relied upon Mr. Franklin's history as a rapist prior to the homicide of Ms. Moran, as well as his reputation in the community for violence. Mr. Franklin was unable to raise any doubt about the accuracy of these facts. On the basis of these facts alone, the jury could have answered the second special issue question "yes," for it is commonly understood that a defendant's past conduct is indicative of his probable future behavior. See Barefoot v. Estelle, 463 U.S. 880, 902-03 (1983); Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). Thus, any doubt the jury might have entertained as to whether Mr. Franklin murdered Ms. Moran could have seemed irrelevant, to reasonable jurors, in their deliberations concerning his probable future dangerousness.

Accordingly, since Mr. Franklin's jury was not obliged to attend to any residual doubt about guilt--by logic or by direction of the court--there is an unacceptable risk that the jury excluded this factor from its sentencing deliberations. The jury may not have "listened" to this evidence, to which "Lockett requires the sentencer to listen." Eddings v. Oklahoma, 455 U.S. at 115 n.10.

2. Mr. Franklin's Prior Prison Record: Good Character Traits And No Probability of Future Dangerousness If Incarcerated

The evidence of Mr. Franklin's prior prison record presented

two distinct mitigating circumstances. As the Court explained in Skipper v. South Carolina, from such a record "the jury could have drawn favorable inferences . . . regarding petitioner's character and his probable future conduct if sentenced to life in prison." 106 S.Ct. at 1671 (emphasis supplied). An adjustment to prison life which demonstrates the ability to abide by established rules and to refrain from violence in an environment where violence is commonplace, reflects extremely positive traits of character. In order to live a well-behaved and well-adjusted life in prison, Mr. Franklin had to be able to exercise self-discipline, show respect for the rights and interests of others, and have the ability to work out disputes rationally and peacefully. In addition, such a record provided a powerful basis for concluding that Mr. Franklin would probably continue to behave this way if he were sentenced to life imprisonment. Since it is reasonable to conclude that "a defendant's past conduct [is] indicative of his probable future behavior," Skipper v. South Carolina, 106 S.Ct. at 1671, Mr. Franklin's prior prison record pointed to the conclusion that he would continue to behave in a non-violent, well-adjusted way if he were returned to prison.[10] Because the trial court failed to give the

10. Indeed, the evidence of Mr. Franklin's prison record provided much stronger support for this conclusion than the evidence before the Court in Skipper. Nearly half of Mr. Franklin's term of imprisonment was served after he was convicted of rape in 1970 and before he allegedly committed the murder of Ms. Moran in 1975. Accordingly, his good behavior during this time is not in the least suspect, as the concurring Justices in Skipper found Skipper's to be. See Id., 106 S. Ct. at 1676. (Powell, J., concurring, joined by Burger, C.J., and Rehnquist,

instructions proffered by Mr. Franklin's lawyer, however, neither of these mitigating factors was given constitutionally adequate consideration.

Unlike residual doubts about Mr. Franklin's guilt, the mitigating circumstances associated with Mr. Franklin's prior prison record could logically have been considered in the course of answering the special issue questions, because they were relevant to the second question, which focused on the probable future dangerousness of Mr. Franklin. So counsel argued. The prosecution forcefully urged that there was a probability of future dangerousness, based on Mr. Franklin's reputation in the community for violence, his prior rapes, and the murder of Ms. Moran. [R.XIII--2958-2959, 2977] Defense counsel countered that there would be no such probability if Mr. Franklin were sentenced to life imprisonment, since he had never been violent or demonstrated a potential for violence when incarcerated. [R.XIII--2963-2964] As framed by counsel, therefore, the real issue before Mr. Franklin's jury was what the jury could do with the stipulated evidence of Mr. Franklin's prison record.

In light of the evidence, the arguments of counsel, and the instructions given by the court, a juror could logically have concluded that the mitigating factors evinced by Mr. Franklin's prison record were very substantial. Mr. Franklin's behavior in

J.)("[g]ood behavior in those circumstances [while in jail awaiting trial or awaiting sentencing after conviction] would rarely be predictive as to the conduct of the prisoner after sentence has been imposed")(emphasis in original).

prison demonstrated that he had the strength of character to live a peaceful, productive life within the structured environment of a prison, and that, so long as he stayed in prison there was no probability that he would pose a threat to others. While there was a chance that he might be released, that chance was slim and did not offset the positive aspects of Mr. Franklin's character revealed by his prison record.[11] For these reasons, the jury could logically have concluded that Mr. Franklin's prison record weighed in favor of a life sentence.

Notwithstanding these conclusions, the jury could reasonably have interpreted the court's instructions as precluding any discretion to answer the second special issue question "no" on this basis. Since the question was whether there was "a probability" that Mr. Franklin "would commit criminal acts of violence that would constitute a continuing threat to society," [T.I--54]; JA 15 (emphasis supplied), the jury could reasonably have decided, on the basis of the evidence, that it had no choice but to answer this question "yes." The jury could not completely deny that Mr. Franklin's past criminal behavior presented "a probability" of "a threat" of future violent harm to others. On balance, the jury could reasonably have concluded that this

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11. At one point in his argument, the prosecutor tried to emphasize the possibility that Mr. Franklin could be released if he were sentenced to life in prison. See R. XIII--2980. Mr. Franklin's objection to this argument was sustained, however, and the jury was instructed to disregard it. Id. This sequence of events could well have reinforced the jury's logical conclusion that the possibility of Mr. Franklin's release was not so serious as to be taken into account.

"probability" of "a threat" of danger was heavily outweighed by Mr. Franklin's strength of character and ability to live peacefully in prison. However, the sole question the jury was asked about future dangerousness did not apparently allow it to balance these competing factors.

Given these findings, which Mr. Franklin's jury reasonably could have made, it is plain that if his jury had been asked, "Should Mr. Franklin be sentenced to death," the answer could have been "no." However, neither of the special issues submitted to the jury, nor any instructions accompanying the issues, gave the jury any discretion to return this answer. Because of the constraints of the narrow questions it was required to answer, the jury was forbidden to sentence Mr. Franklin to life on the basis of its consideration of his ability to live peacefully in prison.

For this reason, Mr. Franklin's sentencing proceeding violated the third rule of Lockett: his sentencer was prevented from "giving independent mitigating weight" to the evidence in mitigation. 438 U.S. at 605. Under the Ohio statute examined in Lockett, as in this aspect of Mr. Franklin's case, the sentencer was not wholly precluded from considering certain mitigating circumstances. Nonstatutory circumstances could be considered in determining whether any of the statutory mitigating circumstances were present. 438 U.S. at 608. However, if none of the statutory circumstances was established--even if nonstatutory circumstances were established--"the Ohio statute mandate[d] the

sentence of death." Id. The "consideration of . . . [nonstatutory mitigating circumstances] . . . would generally not be permitted, as such, to affect the sentencing decision." Id.

The Texas statute operated in the very same way in Mr. Franklin's case. It forced the sentencer to filter the mitigating factors associated with Mr. Franklin's prison record through the narrow statutory question concerned with future dangerousness. Once that question was answered "yes," the sentencer had no available mechanism through which to impose a life sentence even though it reasonably could have concluded that life was the appropriate sentence. The inability of Mr. Franklin's jury to effect a life sentence in these circumstances "prevent[ed] the sentencer . . . from giving independent mitigating weight" to nonstatutory mitigating circumstances. 438 U.S. at 605 (emphasis supplied).

II.

ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE HAS NOT BEEN CONSTRUED TO EFFECTUATE THE INDIVIDUAL CONSIDERATION OF MITIGATING FACTORS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS AS INTERPRETED IN LOCKETT V. OHIO

A. Introduction

The preceding section showed that, under the particular facts of this case, the sentencing jury was precluded from considering relevant mitigating factors, permitted to exclude these factors, and prevented from giving them independent weight. As a result, Mr. Franklin's death sentence is invalid. The judgment of the court of appeals should accordingly be reversed

and Mr. Franklin should be resentenced in a proceeding that comports with the requirements of Lockett. See Hitchcock v. Dugger, 107 S.Ct. 1821, 1824-1825 (1987).

This section demonstrates that the unconstitutionally restrictive consideration of the mitigating evidence in Mr. Franklin's case did not occur by chance or by the aberrant rulings of the trial judge. Instead, the Lockett errors committed here occurred because mitigating circumstances instructions such as the ones he requested are not required under the decisions of the Texas Court of Criminal Appeals. Without them, there is a risk that the Lockett errors in his case will be repeated in others. To demonstrate the prevalence of this risk, Mr. Franklin will examine the construction of article 37.071(b) by the Texas Court of Criminal Appeals since Jurek v. Texas, in the light of the post-Jurek decisions of this Court.

B. The Promise of Jurek v. Texas

In Jurek v. Texas, 428 U.S. 262 (1976) this Court considered several constitutional challenges to the validity of the Texas death penalty scheme. The Court recognized that article 37.071 did not explicitly speak of mitigating circumstances. The constitutionality of the Texas system, therefore, depended on whether the enumerated special issues "allow consideration of particularized mitigating factors." Id. at 272. To make this determination, the Court looked to the Texas court's construction of special issue number two in the only two cases it had then decided. Thus, in Jurek v. State, 522 S.W.2d 934 (Tex. Crim.

App. 1975), aff'd, 428 U.S. 262 (1976), the Court of Criminal Appeals had "indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." Id. at 273. It was this indication that the Texas court would broadly interpret the facially narrow second special issue which caused this Court to reject petitioner's Eighth and Fourteenth Amendment challenges. See Lockett v. Ohio, 438 U.S. 586, 607 (1978).

Since 1976 this Court has adhered to Jurek's analysis of Texas' capital sentencing scheme. See Pulley v. Harris, 465 U.S. 37, 51 (1984)(proportionality review not required); Barefoot v. Estelle, 463 U.S. 880, 906 (1983)(psychiatric testimony admissible at punishment phase). In a recent case, however, the United States Court of Appeals for the Fifth Circuit was faced with a challenge to the application of article 37.071 similar to that which Mr. Franklin now urges.

> We recognize that Jurek specifically upheld the Texas statute, as the state argues. Developing Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty. There is a question whether the Texas scheme permits the full range of discretion which the Supreme Court may require. Perhaps, it is time to reconsider Jurek in light of that developing law.

Penry v. Lynaugh, ___F.2d___, No. 87-2466 (5th Cir. November 25, 1987), slip op. 680. Specifically, two post-Jurek developments are significant.

First, as noted above, at the time Jurek was decided, this Court had only two reported cases upon which to base its critical conclusion that the Texas Court of Criminal Appeals had construed the second special issue "so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." Jurek v. Texas, 428 U.S. at 273. Since 1976, the Texas Court of Criminal Appeals has construed all three special questions in scores of cases. An examination of these cases demonstrates that the Texas court has retreated from its earlier commitment to broadly interpret article 37.071 to "allow consideration of particularized mitigating factors." Id. at 272.

Second, a number of post-Jurek decisions of this Court, beginning with Lockett v. Ohio, 438 U.S. 586 (1978), and concluding with Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), are inconsistent with the Texas Court of Criminal Appeals' post-Jurek treatment of mitigating evidence.

C. Since 1976 the Texas Court Has Consistently Narrowed, Not Broadened, An Already Facially Narrow Statute

1. Texas refuses to require supplementation of the special issues by instructions to consider mitigating circumstances

Jurek v. State, 522 S.W.2d 934 (Tex. Crim. App. 1975), aff'd, 428 U.S. 262 (1976), was the first capital case under article 37.071 to reach the Texas Court of Criminal Appeals. Id. at 936 n.1. There the court held that the special issues provided for by article 37.071(b) "channel the jury's consideration on punishment and effectively insure against the arbitrary and wanton imposition of the death penalty." Id. at

939. Accordingly, the court rejected the notion that a specific list of factors in addition to the special issues is required to be submitted to the jury:

> The fact that an exhaustive and precise list of factors is not specifically included does not indicate that the jury is without adequate guidelines. We are inclined to believe that the factors which determine whether the sentence of death is an appropriate penalty in a particular case are too complex to be compressed within the limits of a simple formula. However, there are some factors which are readily apparent and are viable factors for the jury's consideration. In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of this prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however, inflamed, could withstand.

Id. at 939-940.

Since that time, the Texas court has consistently reiterated that the purpose of the special issues is to provide the guidance to the sentencer that is required by the Constitution. E.g., Green v. State, 682 S.W.2d 271, 286 (Tex. Crim. App. 1984), cert. denied, 470 U.S. 1034 (1985); Evans v. State, 601 S.W.2d 943, 946 (Tex. Crim. App. 1980); Brown v. State, 554 S.W.2d 677, 679 (Tex. Crim. App. 1977). A majority of the court has further held that, consistently with Jurek v. State, no further guidance on

mitigation is required beyond that provided by the special issues.

Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App.), cert. denied, 449 U.S. 893 (1980), appears to be the first post-Jurek decision on this issue. There Quinones requested an instruction that "[e]vidence presented in mitigation of the penalty may be considered should the jury desire, in determining the answer to any of the special issues." Id. at 947. The trial court denied this request and submitted the special issues without explanation. The Court of Criminal Appeals affirmed.

> The question then is whether the language of the special issue is so complex that an explanatory charge is necessary to keep the jury from disregarding the evidence properly before it. In King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977), cert. denied, 434 U.S. 1088, 98 S.Ct. 1284, 55 L.Ed.2d 793 (1978), this Court held that the questions in Art. 37.071 used terms of common understanding which required no special definition. The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required.

Id. Accord, Richardson v. State, __S.W.2d__, No. 68, 934 (Tex. Crim. App. October 28, 1987), slip op. 38; Cordova v. State, 733 S.W 2d 175, 190 (Tex. Crim. App. 1987); Demouchette v. State, 731 S.W.2d 75, 80 (Tex. Crim. App. 1986); Clark v. State, 717 S.W.2d 910, 920-921 (Tex. Crim. App. 1986), cert. denied, 107 S.Ct. 2202 (1987); Anderson v. State, 701 S.W.2d 868, 873 (Tex. Crim. App. 1985), cert. denied, 107 S.Ct. 239 (1986); Penry v. State, 691 S.W.2d 636, 654 (Tex. Crim. App. 1985), cert. denied, 106 S. Ct.

834 (1986); Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984), cert. denied, 106 S.Ct. 190 (1985); Williams v. State, 622 S.W.2d 116, 121 (Tex. Crim. App. 1981), cert. denied, 455 U.S. 1008 (1982). As noted in Cordova v. State, 733 S.W.2d at 189, "Under our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues." The court further acknowledged that, in Texas, jurors are advised on mitigating evidence "indirectly." Id. at 190 n.3.

Undeniably, the Texas procedure which relies wholly upon the special issues to provide the constitutionally necessary guidance for consideration of mitigating evidence is exceedingly narrow. See Lockett v. Ohio, 438 U.S. 586, 607 (1978). The extent of its narrowness is well illustrated in Johnson v. State, 691 S.W.2d 619 (Tex. Crim. App. 1984), cert. denied, 106 S.Ct. 184 (1985). There the appellate court found no error in the refusal to instruct the jury on its option to recommend life imprisonment, since there was no provision in the special issues for such a charge:

> This clearly is not the law. The jury is supposed to consider all the evidence and answer the special issues based upon that evidence. The judge then assesses the punishment, depending upon the answers, at death or life. The jury charge in this case correctly instructed the jury on the law. Appellant did not request any additional charges. The special issues adequately guide the jurors in weighing the mitigating and aggravating circumstances presented by the evidence.

Id. at 626. See also Adams v. State, 577 S.W.2d 717, 729 (Tex.

Crim. App. 1979), rev'd on other grounds, 448 U.S. 38 (1980) (special issues do not comprehend leniency inquiry).

Three judges on the court of criminal appeals, however, have taken issue with the conclusion that the narrow special issues are sufficient by themselves to guide the jury on mitigating evidence:

> If we are insure the constitutionality of 37.071, we must not only give lip service to broadly interpreting it; we must also apply it as interpreted. This could easily be effected by requiring a jury instruction on mitigating evidence. It is folly for the Court to first acknowledge a capital murder defendant's right to produce mitigating evidence, give the jury no guidance in its use, then presume these 12 laypersons know the holdings of Lockett and Eddings until the defendant affirmatively proves the contrary.

Stewart v. State, 686 S.W.2d at 125-26 (Clinton, J. joined by Teague and Miller, J.J., dissenting)(emphasis in original); see also Johnson v. State, 691 S.W.2d at 627 (Clinton, joined by Miller, J., concurring).

The specific concern of the minority was that certain evidence by its very nature "is at once damning and mitigating." Id. at 125. As examples, the dissenters listed mental disease and childhood deprivation. Although such factors might be mitigating in that they may lead the jury to exercise mercy, at the same time they may establish a probability of future dangerousness, thus compelling an affirmative answer to the second issue. According to these judges, the narrow Texas procedure does not permit the jury to accord independent weight to all relevant mitigating circumstances, in violation of Lockett

v. Ohio Id. at 125-126. To insure that Texas procedure complies with Lockett, the dissenters would require an instruction on mitigating evidence.

2. Special issue number one does not properly include consideration of mitigating circumstances since an affirmative answer logically follows anytime a person is convicted of intentional murder

Special issue number one is submitted in every capital case in Texas. Here it asked:

> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Donald Gene Franklin, that caused the death of Mary Margaret Moran, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

[T.I--54]; JA 15. This Court declined in Jurek to decide whether the first issue properly included consideration of mitigating factors and instead deferred to the Texas Court of Criminal Appeals. Jurek v. Texas, 428 U.S. 272 n.7. It is now clear that the Texas court has not construed this issue to include consideration of mitigating circumstances.

Initially it is important to note that two key components of this issue--"beyond a reasonable doubt" and "deliberately"--are not required to be defined under Texas law. See Marquez v. State, 725 S.W.2d 217, 241 (Tex. Crim. App. 1987)(proof beyond a reasonable doubt); Russell v. State, 665 S.W.2d 771, 780 (Tex. Crim. App. 1983)(deliberately).[12] In Jurek, this Court pointed out that the Texas court had "yet to precisely define" certain

12. Neither was defined in Mr. Franklin's case.

terminology in issue number two. Jurek v. Texas, 428 U.S. at 273. Implicit in this is the recognition that such definitions would be useful in evaluating an issue's capacity for guidance. That no such definitions have yet been given is one indication of the lack of guidance in the Texas system. C.f. Godfrey v. Georgia, 446 U.S. 420, 429 (1980)(jury given no guidance concerning statutory terms); see Williams v. State, 674 S.W.2d 315, 322 (Tex. Crim. App. 1984)(while first issue is confusing, and definition would have been helpful, it is not essential).

Additionally, special issue number one simply does not focus the jury's attention upon any mitigating factor.[13] By the time the punishment phase of the trial is reached, a rational juror could only answer this question yes.

Since "intentionally" is the exclusive culpable mental state for capital murder under Tex. Penal Code Ann. § 19.03(a)(2), every person convicted of capital murder in the course of robbery

13. Although the Jurek Court envisioned a specific mitigating function that could be served by special issue number three, no similar attempt was made regarding issue number one. Jurek v. Texas, 428 U.S. at 272 n.7. The Texas Court of Criminal Appeals has specifically rejected the claim that this issue affirmatively precludes consideration of mitigating circumstances. See Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984), cert. denied, 106 S. Ct. 190 (1985). On the other hand, the court has not attempted to explain how the issue leads the sentencer to consider mitigating circumstances. To the contrary, the court appears satisfied that sufficient mitigation guidance can come from the other special issues. Thus, in Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App.), cert. denied, 449 U.S. 893 (1980), the court refused to require an "explanatory charge" on mitigation because "[t]he jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence." Id. at 947 (emphasis supplied).

or kidnapping has necessarily been determined to have acted intentionally. As noted, "deliberately" is typically not defined in Texas. "Intentionally" is defined, however, as required by Tex. Penal Code Ann. § 6.03(a)(Vernon 1974). Accordingly, the jury in Mr. Franklin's case was instructed that: "A person acts 'intentionally,' or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." [R.I--30] Considering both the failure to define "deliberately," and the definition given for "intentionally," it cannot fairly be argued that the jury could have perceived a difference between these two words. If it perceived no difference, then a "yes" answer to special issue number one was automatic once the jury found, as it did, that the defendant had acted intentionally. Clearly, a question which must be automatically answered against the accused provides no guidance for the jury's exercise of sentencing discretion. See Stewart v. Texas, 106 S. Ct. 190, 193 n.4 (Marshall, J., dissenting from denial of certiorari).

Justice Blackmun has captured the meaningless of this special issue in his dissenting opinion in Barefoot v. Estelle, 463 U.S. 880 (1983):

> It appears that every person convicted of capital murder in Texas will satisfy the other requirement relevant to Barefoot's sentence, that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result . . ."

> because a capital murder conviction requires a finding that the defendant intentionally or knowingly cause[d] the death of an individual.

Id. at 917 n.1.

Although the Texas Court of Criminal Appeals has "repeatedly and resoundingly rejected" this contention, e.g, Marquez v. State, 725 S.W.2d 217, 244 (Tex. Crim. App. 1987), its decisions are not entirely consistent. In King v. State, 631 S.W.2d 486, 502 (Tex. Crim. App.), cert. denied, 459 U.S. 928 (1982), the court noted the "tremendous amount of confusion and dissension among the bench and bar over the meaning and import of the word "deliberately." In Blansett v. State, 556 S.W.2d 322, 327 n.6 (Tex. Crim. App. 1977), the court recognized the obvious: "[A]" jury having found that defendant intentionally committed a capital murder to be consistent would have to find that the act was deliberately done." And, very recently, in Gardner v. State, 730 S.W.2d 675, 680 (Tex. Crim. App. 1987), the court noted that "absent applicability of the law of parties, it will be the extraordinary case in which evidence sufficient to prove an 'intentional' murder for purposes of § 19.03(a)(2) will not also serve in whole or in part to establish that the killing was 'committed deliberately and with the reasonable expectation that . . . death . . . would result.'" See Penry v. Lynaugh, __F.2d __, No. 87-2466 (5th Cir. November 25, 1987), slip op. 680 (answer "likely to be yes").

The best indication that this issue is meaningless is that in twelve years of reported decisions, not a single one has been reversed on appeal for insufficient evidence on special issue number one. This fact gives substance to Justice Blackmun's observation in Barefoot that this special issue is in fact not an issue at all once a defendant has been convicted of capital murder. To state it another way, article 37.071(b)(1), and the construction of it adopted by the Texas Court of Criminal Appeals, is such as to render it useless in directing the jury's consideration of mitigating evidence. Accordingly, it cannot fairly be contended that special issue number one properly includes consideration of mitigating factors.

3. Special issue number three has limited potential for mitigation and then only when submitted

Tex. Code Crim. Proc. Ann. art. 37.071(b)(3)(Vernon Supp. 1987) provides for a third special issue in some cases:

> if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Unlike question number one, question number three has been expressly construed to permit the jury to consider "particularized mitigating circumstances." Evans v. State, 601 S.W.2d 943, 946 (Tex. Crim. App. 1980). See Esquivel v. McCotter, 777 F.2d 956, 957 (5th Cir. 1985). Two things are important about this issue. First, due to its very nature, it has a limited potential for consideration of mitiating circumstances. See Horne v. State, 607 S.W.2d 556, 558 n.3 (Tex. Crim. App. 1980)("may be

true that jury . . . will more than likely answer this issue against the accused"). Second, special issue number three, is only submitted where there is evidence raising provocation. E.g., Marquez v. State, supra, 725 S.W.2d at 224; Hernandez v. State, 643 S.W.2d 397, 401 (Tex. Crim. App. 1982).[14] Practically speaking the third special issue "rarely enters into the decision of the jury." Penry v. Lynaugh, ___F.2d___, No. 87-2466 (5th Cir. November 25, 1987), slip op. 679.

4. Special issue number two is insufficient to require consideration of all mitigating circumstances

In the present case the jury was instructed:

> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society?

[T.I--54]; JA 15.

In Jurek the Court noted that the "Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as 'criminal acts of violence' or 'continuing threat to society.'" Jurek v. Texas, 428 U.S. at 273. In the intervening eleven years, it still has not done so. Indeed it has held that these terms, as well as "probability," need not be defined for the jury. See King v. State, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977). Nor is it necessary to define "proof beyond a reasonable

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14. There was no such evidence in Mr. Franklin's case, and special issue number three was not submitted.

doubt." See Marquez v. State, 725 S.W.2d at 241.[15]

Apart from the lack of definitions, there are other problems with the construction given special question number two by the Texas Court of Criminal Appeals.

This Court has made it clear that the sentencer must consider both the character and record of the individual offender and the circumstances of the offense. See Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also Booth v. Maryland, 107 S.Ct. 2529, 2535 (1987)(jury's "constitutionally required task" is to determine sentence in light of background and record of the accused and the circumstances of the crime). By their very nature, issues number one and three are concerned only with historical facts involving the offense itself. See Horne v. State, 607 S.W.2d 556, 563 (Tex. Crim. 1980)(Roberts, J., concurring). The answer to these issues will depend, almost invariably, solely on the circumstances of the offense. Only the second issue then, has even the potential for focusing on the "particularized circumstances of the . . . individual offender." Yet the Texas court has many times held that the circumstances of the instant offense itself can alone be sufficient to sustain an affirmative finding to issue number two. E.g., Green v. State, 682 S.W.2d 271, 289 (Tex. Crim. App. 1984), cert. denied, 470 U.S. 1034 (1985); McMahon v. State, 582 S.W.2d 786, 792 (Tex. Crim. App. 1978), cert. denied sub. nom. McCormick v. Texas, 444

15. None of these terms were defined in Mr. Franklin's case.

U.S. 919 (1979); Duffy v. State, 567 S.W.2d 197, 208 (Tex. Crim. App. 1978), cert. denied, 439 U.S. 991 (1978).

Thus, Texas appears to have come full circle since Jurek v. State, 522 S.W.2d at 939-940, where it noted that special issue number two is broad enough to comprehend an inquiry into various individualized circumstances of the capital defendant, including his age, criminal record and mental condition. This construction by the court, that the circumstances of the offense alone can support a "yes" answer to issue number two, amounts to a recognition of the extremely limited role of that issue in guiding and focusing a juror's consideration on the particularized circumstances of the individual offender. In Barefoot v. Estelle, 463 U.S. 880, 896 (1983), the Court recognized that future dangerousness is a constitutionally acceptable criterion for imposing the death penalty. Mr. Franklin does not dispute that it is an appropriate factor among the many that should be considered. However, it cannot constitutionally be the sole criterion. Yet, that is the law of Texas.

5. The Constitutional promise of the Texas statute has been exceedingly diminished by the Texas court's application of the statute since Jurek

This Court in Jurek expressly relied on the Texas state court's interpretation of article 37.071 in holding that that statute provided the guidance required by the Constitution. As recognized two years later in Lockett v. Ohio, 438 U.S. 586 (1978), article 37.071

> survived the petitioner's Eighth and Fourteenth Amendment attack because three justices concluded that the Court of Criminal Appeals had broadly interpreted the second question--despite its facial narrowness--so as to permit the sentencer to consider "whatever mitigating circumstances" the defendant might be able to show.

Id. at 607. On July 2, 1976, decisions were also announced upholding the facial validity of the death penalty statutes of Georgia and Florida. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). In Lockett, 438 U.S. 586 (1978), the Court remarked that "[n]one of [these] statutes . . . clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." Id. at 607 (emphasis supplied).

Since 1976 this Court has re-examined both the Georgia and Florida statutes in light of subsequent construction by those states' courts. As a result, death sentences imposed upon prisoners in both states have been invalidated, notwithstanding the Court's earlier decisions in Gregg and Proffitt. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Godfrey v. Georgia, 446 U.S. 420 (1980). A similar examination of article 37.071, in light of subsequent construction by the Texas Court of Criminal Appeals, demonstrates that that court is interpreting the statute much more narrowly than was apparent in 1976. The result of this narrow interpretation is that consideration of mitigating evidence is being unconstitutionally restricted, as it was in Mr. Franklin's case.

D. Developing Law in This Court Has Made Plain That the Unfulfilled Promise of the Texas Statute Is Constitutionally Intolerable

1. Texas has unconstitutionally narrowed the jury's discretion to decline to impose the death sentence

On the one hand, a state must narrow the class of persons subject to execution by giving the sentencer specific and detailed guidance. However, "[i]n contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 107 S. Ct. 1756, 1772-1773 (1987)(emphasis in original). There is a "tension . . . between [these] two central principles of our Eighth Amendment jurisprudence." California v. Brown, 107 S. Ct. 837, 841 (1987)(O'Connor, J., concurring). Clearly, this tension can be constitutionally resolved by the proper jury instructions which give the jury discretion to decline to impose the death penalty. Just as clearly, however, no resolution is achieved in Texas by an unexplicated submission of the special issues which too narrowly restrict the discretion required by the Constitution.

This is well illustrated by Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979), rev'd on other grounds, 448 U.S. 38 (1980). There the defendant sought an instruction which would have permitted the jury to extend him leniency, if it felt he deserved it, even though the special issues were answered affirmatively. Id. at 729. The court of criminal appeals

rejected this contention, concluding that the Supreme "Court clearly did not intend that the authority be given such broad discretion to decide whether a given defendant ought to receive the death penalty." Id. (emphasis supplied). The court went on to find that "[t]he three issues specified in Art. 37.071, supra, provide this direction and limit the discretion of the jury so as to prevent the arbitrary or capricious imposition of the death penalty." Id. at 730 (emphasis supplied). The Adams court was correct in holding that the special issues limit the jury's discretion. This is the vice rather than the virtue of the Texas system, however. As recognized in McCleskey, the Constitution restricts the "State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 107 S. Ct. at 1773. Article 37.071, which limits discretion to evidence relevant only to the narrow special issues, is irreconcilable with McCleskey.

2. By restricting the jury to "certain enumerated" special issues, Texas limits consideration of nonstatutory mitigating circumstances

In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the advisory jury was given a list of statutory mitigating circumstances which it was allowed to consider. The sentencing judge later announced that he was "mandated to apply the facts to certain enumerated 'aggravating' and 'mitigating' circumstances." Id. at 1824 (emphasis in original). This Court reversed the death sentence, holding that "it could not be clearer that the advisory jury was

instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper . . . Eddings . . . [and] Lockett . . . ." Id.

In a case like Mr. Franklin's, there is no perceptible difference between the Texas procedure, in which the jury is directed to answer "certain enumerated" statutory questions, and the procedure employed in Hitchcock. If there is a difference, it is only that the Texas system is even more restrictive, because in Florida the list of potentially mitigating circumstances is more comprehensive than are the Texas special issues. See Hitchcock v. Dugger, 107 S.Ct. at 1823 n.3.

3. As applied in a case like Mr. Franklin's, Article 37.071(b) is indistinguishable from the Ohio statute invalidated in Lockett

Section 2929-04(B) of the Ohio Revised Code, discussed in Lockett v. Ohio, 438 U.S. 586 (1978), required imposition of the death penalty if at least one aggravating factor was found, unless at least one of the three following mitigating circumstances was established by a preponderance of the evidence:

> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of

insanity.

Id. at 607.

The Ohio Supreme Court had upheld its statute "because the mitigating circumstances in Ohio's statute are 'liberally construed in favor of the accused.'" Id. at 608. Specifically the sentencer "may consider factors such as the age and criminal record of the defendant in determining whether any of the mitigating circumstances is established." Id. at 608 (emphasis supplied).

This Court upheld the Texas statute in Jurek despite its facial narrowness, because the Texas Court of Criminal Appeals--like the Ohio Supreme Court--had indicated it would construe special issue number two to allow the defendant to bring before the jury "whatever mitigating circumstances he could show." Jurek v. Texas, 428 U.S. 262, 273 (1976). This indication came from Jurek v. State, 522 S.W.2d at 939-940 in which the Texas court had stated:

> In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."

Jurek v. Texas, 428 U.S. at 272-273 (emphasis supplied).

In Ohio, however, a similar procedure was condemned, for

> even under the Ohio court's construction of the statute, only the three factors specified in the statute can be considered in mitigation of the defendant's sentence.

Lockett v. Ohio, 438 U.S. 586, 608 (1978). Mitigating factors beyond the statutory factors "would generally not be permitted, as such, to affect the sentencing decision." Id.

When the Court approved the Texas statute, this vice was not apparent even though, as in Ohio, the jury was asked to consider only a narrow range of questions. There was the promise from the Texas Court of Criminal Appeals that the jury could consider "what ever mitigating circumstances [the defendant] could show," and there was no indication, as there was in Ohio, that the jury's consideration of these circumstances "would generally not be permitted, as such, to affect the sentencing decision." Subsequent history has shown, however, that this promise was illusory. The Texas statute, like the Ohio statute, now clearly forbids a sentencing decision to be based upon mitigating evidence unrelated to the statutory questions.

Sumner v. Shuman, 107 S.Ct. 2716 (1987) articulates most graphically the constitutional fault in such a sentencing scheme. There the Court considered Nevada's capital procedure where death was mandatory upon a finding of two "indicators": conviction for murder while in prison under a statute which yielded a sentence of life imprisonment without parole. Id. at 2724. Finding that these two indicators "do not provide an adequate basis on which to determine whether the death sentence is the appropriate

sanction in any particular case," the death sentence was reversed.

> Not only do the two elements that are incorporated in the mandatory statute serve as incomplete indicators of the circumstances surrounding the murder and of the defendant's criminal record, but they say nothing of the "[c]ircumstances such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct.

Id. at 2725. Although the Texas statute clearly permits the jury to consider more potentially mitigating evidence than did the Nevada statute, its special issues are also "incomplete indicators," which are silent on the circumstances of the offender such as youth, intoxication, or mental condition. Accordingly, the narrow Texas statute provides a constitutionally inadequate basis to determine the appropriateness of the death sentence.

4. Lockett requires the sentencer to listen; Texas does not

In Jurek, the Texas Court of Criminal Appeals construed article 37.071 permissively. Recognizing that it did not mandate consideration of mitigating factors on its face, the court nonetheless approved the statute because "the jury could consider" various factors, such as the age, record and mental condition of the defendant. Jurek v. State, 522 S.W.2d 1934, 939, 940 (Tex. Crim. App. 1975), aff'd, 428 U.S. 262 (1976)(emphasis supplied). A decade later, Texas remains content with a wholly permissive system. In Anderson v. State, 701

S.W.2d 868, 873-874 (Tex. Crim. App. 1985), cert. denied, 107 S.Ct. 239 (1986), the court refused to require additional instructions because article 37.071 "allows the jury to consider mitigating evidence."

This Court, in Jurek v. Texas, 428 U.S. 262 (1976), also noted the permissive nature of article 37.071. After saying that "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors," the court quoted the language from Jurek v. State in which the Texas court indicated that, in answering special issue number two, "the jury could consider" factors including the defendant's age, criminal record and mental condition. Id. 273; see also Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 n.6 (1977).

Unlike the Texas court, however, this Court has since made it clear that consideration of mitigating circumstances is not merely permissive. Thus, in Eddings v. Oklahoma, 455 U.S. 104 (1982) this Court reversed a death sentence after determining that the sentencer had refused to consider certain relevant mitigating evidence.

> The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> * * *
>
> On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating

circumstances.

Id. at 115, 117 (emphasis supplied). As the Court further pointed out: "Lockett requires the sentencer to listen." Id. at 115 n.10. See also McCleskey v. Kemp, 107 S.Ct. 1756, 1773 (1987)("the Constitution limits a state's ability to narrow a sentencer's discretion to consider relevant evidence"); California v. Brown, 107 S.Ct. 837, 839 (1987)(consideration is "constitutionally indispensible"); Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986)(sentencer may not refuse to consider); Spaziano v. Florida, 468 U.S. 447, 459 (1984)("constitutional obligation" to evaluate unique circumstances of defendant).

5. Merely permitting the presentation of all relevant mitigating evidence does not insure that the jury will consider this evidence

In concluding that the Texas procedure did not violate the Eighth and Fourteenth Amendments to the United States Constitution, the Jurek Court wrote:

> By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has insured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function.

Jurek v. Texas, 428 U.S. 262, 276 (1976). But subsequent decisions of the Court establish that a capital sentencer's consitutional obligation to consider mitigating evidence is not satisfied simply because the defense is able to bring all mitigating circumstances before it. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982). In

both cases the petitioners were allowed to introduce evidence in mitigation, apparently without limitation. Hitchcock v. Dugger, 107 S. Ct. at 1824; Eddings v. Oklahoma, 455 U.S. at 107-108. Despite their unlimited freedom to introduce evidence, this Court reversed both sentences of death because the sentencers had refused to consider the evidence of mitigating circumstances presented. Hitchcock v. Dugger, 107 S. Ct. 1824; Eddings v. Oklahoma, 455 U.S. at 113.

There is a good reason for this rule. It is by now axiomatic that, because the penalty of death is qualitatively different from all others, there is a heightened need for reliability in sentencing procedures. E.g., Caldwell v. Mississippi, 105 S.Ct. 2633, 2645 (1985); Zant v. Stephens, 462 U.S. 862, 884-885 (1983); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). As Justice O'Connor noted in Eddings, a capital sentencing determination should not leave it to speculation

> whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them to be insufficient to offset the aggravating circumstances . . . .
>
> Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings v. Oklahoma, 455 U.S. 104, 119 (O'Connor, J., concurring).

Even if Texas law permits the unfettered introduction of relevant mitigating circumstances, it is wholly speculative whether the jury actually considers these circumstances under the

Texas special issue procedure. Only jury instructions connecting mitigating circumstances with the special issues submitted, such as those proposed by Mr. Franklin and refused by his trial judge, can assure that mitigating evidence is given its constitutionally indispensable place in the capital sentencing process. A proper jury instruction "fosters the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" California v. Brown, 107 S.Ct. 837, 840 (1987); C.f. California v. Brown, 107 S.Ct. at 841 (O'Connor, J., concurring)(instructions taken as a whole "must clearly inform the jury that they are to consider any relevant mitigating evidence").

III.

A SURVEY OF THE VARIOUS CAPITAL SENTENCING SYSTEMS IN THE UNITED STATES REVEALS THAT NO OTHER STATE HAS PROVIDED SUCH INADEQUATE PROCEDURAL SAFEGUARDS TO INSURE COMPLIANCE WITH LOCKETT V. OHIO.

A. Practice in Other Jurisdictions: The Weight of Current Legislative Judgment

Presently 33 states besides Texas have statutes providing for jury participation in capital sentencing. The New York statute has been declared unconstitutional for failure to provide for consideration of individualized circumstances of the offender. People v. Smith, 479 N.Y.S.2d 706, 725 (N.Y. 1984), cert. denied, 105 S. Ct. 1226 (1985). Of the other 32 states, 31 have explicit statutory provisions regarding mitigating evidence. See Ala. Code § 13A-5-46-e (1982); Ark. Stat. Ann. § 41-1304 (1987); Cal. Penal Code § 190.3 (Supp. 1987); Colo. Rev. Stat. §

16-11-103(2)(a)(1986); Conn. Gen. Stat. Ann. § 53a-46a (g)(West 1985); Del. Code Ann. tit. 11, § 4209(c)(4)(1979); Fla. Stat. Ann. § 921.141(2) (West 1985); Ga. Code Ann. § 17-10-30(b)(1984); Ill. Ann. Stat. Ch. 38 § 9-1(c)(Smith-Hurd Supp. 1987); Ind. Code Ann. § 35-50-2-9(c)(Burns Supp. 1987); Ky. Rev. Stat. Ann. § 532.025(2)(Baldwin 1981); La. Code Crim. Proc. Ann. art. 905.3 (West Supp. 1987); Md. Ann. Code art. 27, § 413 (Supp. 1987); Mass. Gen. Laws Ann. Ch. 279, § 68 (West Supp. 1987); Miss. Code Ann. § 99-19-101 (2) (Supp. 1987); Mo. Ann. Stat. § 565.032.1 (Vernon Supp. 1987); Nev. Rev. Stat. § 175.554 (1986); N.H. Rev. Stat. Ann. § 630:5 II(b)(1986); N.J. Stat. Ann. § 2C:11-3 (West. Supp. 1987); N.M. Stat. Ann. § 31-20A-2(1987); N.C. Gen. Stat. § 15A-2000(b)(1983); Ohio Rev. Code Ann. § 2929.03(D)(2)(Baldwin 1982); Or. Rev. Stat. § 163.150(2) (b)(1985); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(Purdon 1982); S.C. Code Ann. § 16-3-20(C)(Law. Co-op. Supp. 1986); S.D. Codified Laws Ann. § 23A-27A-1 (Supp. 1987); Tenn. Code Ann. § 39-2-203(e) (1982); Utah Code Ann. § 76-3-207(2)(Supp. 1987); Va. Code § 19.2-264.4 (1983); Wash. Rev. Code Ann. § 10.95.060(4) (Supp. 1987); Wyo. Stat. § 6-2-102(d)(1977); see also Model Penal Code § 210.6 (proposed official draft 1962). Examination of case law from the remaining state, Oklahoma, demonstrates that juries there are specifically instructed on mitigating circumstances. See Van Woundenberg v. State, 720 P.2d 328, 336 (Okla. Crim. App. 1986).

Recently, Oregon adopted a special issue procedure virtually identical to article 37.071. See Or. Rev. Stat. § 163.150

(1985). Significantly, however, the Oregon jury is to be specifically instructed to consider any mitigating circumstances offered in evidence, including, but not limited to, the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed. . . ." Or. Rev. Stat. § 163.150(2)(b) (1985). That is, Oregon has statutorily mandated explicit instruction on the mitigating circumstances which are supposed to be discerned by Texas juries without instruction. Cf. Jurek v. State, 522 S.W.2d at 939-940.

The mere fact that other states have chosen different capital sentencing schemes does not prove that the Texas procedure is unconstitutional. See Spaziano v. Florida, 468 U.S. 447, 464 (1984). On the other hand, this Court frequently conducts comparative analyses to determine the purport of current legislative judgment. E.g., Enmund v. Florida, 458 U.S. 782, 793 (1982); Beck v. Alabama, 447 U.S. 625, 637 (1980); Coker v. Georgia, 433 U.S. 584, 596 (1977); Woodson v. North Carolina, 428 U.S. 280, 293 (1976). An examination of that judgment nationwide leads to the conclusion that no where but in Texas is consideration of mitigating evidence left so completely to happenstance and disjoined from any operative effect on the death sentencing decision as it was under Texas practice in Mr. Franklin's case.

B. Of the Lower Federal Courts Only the Fifth Circuit Has Approved Schemes Similar to Texas

The United States Court of Appeals for the Fifth Circuit has expressly held that the Texas death penalty scheme is not unconstitutional for failure to require an instruction on the use of mitigating evidence. Esquivel v. McCotter, 777 F.2d 956, 958 (5th Cir. 1985); O'Bryan v. Estelle, 714 F.2d 365, 385 (5th Cir. 1983).[16]

No other lower federal court which has considered this question has approved instructions on mitigation which are as spartan as those found in Texas.

The Eleventh Circuit requires "that the trial judge 'clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death.'" Moore v. Kemp, 809 F.2d 702, 731 (11th Cir. 1987); Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir. 1986). Texas requires no instruction on the option to recommend against death, see Johnson v. State, 691 S.W.2d 619, 626 (Tex. Crim. App. 1984), cert. denied, 106 S.Ct. 184 (1985), any more than it requires instruction on mitigating circumstances.

In Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986) the court of appeals rejected a challenge to the Utah statute, noting that the jury instructions "emphasized that mitigating factors

16. Very recently, a panel of the Fifth Circuit addressed a claim similar to the one made by Mr. Franklin. Although the court rejected that claim because it believed itself bound by Jurek v. Texas and previous Fifth Circuit opinions, it went on to discuss the developing law in this Court and to suggest that "[p]erhaps, it is time to reconsider Jurek in light of that developing law." Penry v. Lynaugh, ___ F.2d ___, No. 87-2466 (5th Cir. November 25, 1987), slip op. 680.

should be considered and that they could prove decisive in the balancing process." Id. at 1265. No such instruction is given in Texas.

And in Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), the court of appeals upheld the constitutionality of the Virginia death penalty statute after recognizing that the jury charge, which instructed the jury on five occasions to consider mitigating evidence, left the definite impression that the jury was to take into account all mitigating evidence. See also Rook v. Rice, 783 F.2d 401, 405 (4th Cir. 1986)(jury instructed to weigh aggravating and mitigating circumstances).

C. That Specific Standards Are Not Required For Balancing Aggravating and Mitigating Circumstances Does Not Mean That No Guidance At All Is Required

Texas relied strongly on Zant v. Stephens, 462 U.S. 862 (1983), in the courts below in opposition to Mr. Franklin's claim. Careful examination of Zant, however, reveals that it does not diminish Mr. Franklin's contention.

In Zant the question was whether invalidation by the Georgia Supreme Court of one of three statutory aggravating circumstances found by the jury rendered the defendant's death sentence impermissible. Id. at 864. In the context of this issue, concerned solely with aggravating factors, the Court commented that Jurek v. Texas "makes clear that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." Id. 875 n.13. Mr. Franklin has no quarrel whatsoever with that proposition. See McCleskey v. Kemp,

107 S.Ct. 1756, 1778 n.37 (1987). His position, also is simply that, even though specific balancing standards are not required, a capital sentencing jury must nonetheless be instructed to consider all mitigating evidence presented, and must be given some way to express its consideration of mitigating evidence in its verdict. This is certainly true where the state's method of submitting the question of a capital sentence to the jury risks--as the special issue used in Texas does--that mitigating evidence will otherwise be wholly disregarded. In Zant, the jury was explicitly authorized to consider "all facts and circumstances presented in extinuation [sic], mitigation . . . [and] any mitigating circumstances. . . authorized by law." Zant v. Stephens, 456 U.S. 410, 411 n.1 (1982). Mr. Franklin's jury was given no such change, and was precluded from considering relevant mitigating circumstances because of the narrowness of the two special issues presented to it. If Lockett, Eddings, Skipper and Hitchcock are to apply in Texas as elsewhere, life cannot constitutionally be taken under such a sentencing procedure.

CONCLUSION

For these various reasons, the decision below should be reversed.

Respectfully submitted:

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By _____
MARK STEVENS

Attorneys for Petitioner

NO. 87-5546

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner

v.

JAMES A. LYNAUGH, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

BRIEF FOR PETITIONER
ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

I, Mark Stevens, a member of the bar of this Court, hereby certify that on this ay of December, 1987, one copy of the Petition for Writ of tiorari in the above-entitled case was mailed, first class, postage prepaid to William Zapalac, Assistant Attorney General for the Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, counsel for the respondent herein. I further certify that all parties required to be served have been served.

_____
MARK STEVENS

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES OF THE STATE OF TEXAS

Tex. Penal Code Ann. § 19.03 (Vernon 1974):

(a) A person commits an offense if he commits murder as defined under § 19.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981):

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the

deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.